Supreme Court, U.S.
FILED
SEP 12 1994
OFFICE OF THE CLERK

(1)

No. 94-474

IN THE

Supreme Court of the United States

October Term, 1994

JORGE HERNANDEZ,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. MISCHEL
Attorney for Petitioner
233 Broadway—Suite 3507
New York, New York 10279
(212) 227-7040

45pp

QUESTION PRESENTED

1. Whether the evidence was legally sufficient to establish that Petitioner used or carried a firearm "during and in relation to" a drug trafficking crime within the meaning of 18 U.S.C. §924(c)(1), where the heroin Petitioner was accused of possessing with the intent to distribute, and a pistol, were found by law enforcement officers concealed in separate parts of the partially closed front-end trunk of a Porsche, which was apparently entrusted to Petitioner, and where Petitioner was alleged to have admitted when arrested that he was preparing the heroin for distribution to a particular person later that day.

LIST OF PARTIES

The parties to the proceedings below were Petitioner Jorge L. Hernandez and the Respondent, United States of America.

TABLE OF CONTENTS

	PAGE
Question Presented.	i
List of Parties	ii
Table of Authorities.	iv
Opinion Below	3
Jurisdictional Statement. . . .	4
Statute Involved.	5
Statement of the Case	7
Reasons For Granting The Writ .	12
Conclusion.	33

APPENDIX

Opinion of the United States Court of Appeals For The Third Circuit dated June 8, 1994 . . . . . 1a

TABLE OF AUTHORITIES

	PAGE
FEDERAL CASES	
Smith v United States, __U.S.__, 113 S.Ct. 2050 (1993)	12, 13, 14, 23, 24
United States v Anderson, 881 F.2d 1128 (D.C. Cir. 1989) .	20
United States v Bailey, 995 F.2d 1113 (D.C. Cir. 1993) .	21, 23, 32
United States v Bruce, 939 F.2d 1053 (D.C. Cir. 1991) .	18, 19, 20, 22, 23, 24, 30, 31
United States v Clemis, 11 F.3d 597 (1993)	15
United States v Dahlman, 13 F.3d 1391 (10th Cir. 1993). .	14
United States v Derr, 990 F.2d 1130 (D.C. Cir. 1993) .	20, 22, 23, 24, 30, 31
United States v Harris, 10 F.3d 596 (8th Cir. 1993) [per curiam].	14, 28
United States v Hughes, 15 F.3d 798 (1994).	27

TABLE OF AUTHORITIES (Cont'd)

	PAGE
United States v Pace, 10 F.3d 1106 (5th Cir. 1993). .	14, 18
United States v Paulino, 13 F.3d 20 (1st Cir. 1994) . . .	26
United States v Reyes-Mercado, 22 F.3d 363 (1994).	24, 26
United States v Theodoropoulos, 886 F.2d 587 (1989)	16, 31
United States v Williams, 952 F.2d 418 (D.C. Cir.1991) . .	19, 20
United States v Wilson 884 F.2d 174 (5th Cir. 1989) . .	14
United States v Williams, 112 S.Ct. 1735 [1992]	11

FEDERAL STATUTES

18 U.S.C. §922(k)	3, 7

TABLE OF AUTHORITIES (Cont'd)

	PAGE
FEDERAL STATUTES (Cont'd)	
18 U.S.C. §924(c)	3, 5, 7, 10, 12, 13, 14, 15, 18, 19, 21, 23, 24, 25, 26, 31, 32
21 U.S.C. §841(a)(1)	3, 7
28 U.S.C. § 1254	4

No. 94-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JORGE HERNANDEZ,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Jorge Hernandez respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Third Circuit, entered on June 8, 1994, which affirmed the judgment of the United States District Court, District of New

Jersey (Bissell, D.J.), entered on June 2, 1993.

OPINION BELOW

The opinion of the Court of Appeals is not officially reported but appears in the Appendix as 1a-3a. The Court of Appeals, in its June 8, 1994 Memorandum Opinion, affirmed the final judgment of the United States District Court, District of New Jersey, convicting Petitioner of possession with intent to distribute a Schedule I controlled substance (Heroin), in violation of 21 U.S.C. §841(a)(1), possession and use of a firearm in relation to the commission of a drug trafficking offense, in violation of 18 U.S.C. §924(c), and possession of a firearm which had the manufacturer's serial number obliterated, in violation of 18 U.S.C. §922(k), and imposing sentence, pursuant to the United States Sentencing Guidelines.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

The Order of the Court of Appeals sought to be reviewed was filed on June 8, 1994.

By Order dated September 3, 1994, the Honorable David H. Souter, Associate Justice, granted Petitioner's application to extend by six days to September 12, 1994, the time to file his Petition for a Writ of Certiorari.

As extended by Justice Souter, this Petition for a Writ of Certiorari is filed within the time prescribed by U.S. Sup.Ct. Rule 13, 28 U.S.C.A.

STATUTE INVOLVED

18 U.S.C. §924(c)(1):

"Whoever, during and in relation to any *** drug trafficking crime (including a *** drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime *** be sentenced to imprisonment for five years *** Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for *** the drug trafficking crime in which the firearm was used or carried. No person

sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein."

STATEMENT OF THE CASE

Petitioner Jorge L. Hernandez was accused by a federal grand jury of committing the crimes of possession with intent to distribute a Schedule I controlled substance (Heroin), in violation of 21 U.S.C. §841(a)(1), possession and use of a firearm in relation to the commission of a drug trafficking offense, in violation of 18 U.S.C. §924(c)(1), and possession of a firearm which had the manufacturer's serial number obliterated, in violation of 18 U.S.C. §922(k).

The charges stemmed from a five month investigation of Petitioner by a division of the Internal Revenue Service for possible "money laundering" violations. The investigation revealed nothing of substance until federal investigators, assisted by local (county) investigators, surreptitiously followed Petitioner to a storage bin in New Jersey, allegedly rented

by him, and then found, inside the bin, heroin and a semi-automatic pistol concealed in the front-end trunk of a Porsche, and so-called drug paraphernalia and other drugs on, or in the vicinity of, the Porsche.

Petitioner was never observed by the investigators driving the Porsche, nor did they observe anyone else driving it. Moreover, no direct evidence was presented that Petitioner owned the vehicle; rather the evidence presented suggested that the vehicle was entrusted to Petitioner to repair. When found by the investigators inside the bin, the Porsche was partially covered with a tarp and was on a lift.

Prior to trial, Petitioner moved to suppress the contraband, arguing in essence that the warrantless search of the bin and its contents was conducted without probable cause or his consent. Specifically noted were the facts that Petitioner was tricked

into opening the door to the bin by the federal agent in charge of the investigation; that, as a native of Dominican Republic, Petitioner was intimated by the presence of five agents conducting the search, including the agent in charge who was described as "a big guy" (A121-2); that he was placed against the wall of the bin and guarded by two agents for some 15 to 20 minutes; and that he was not informed that the agents needed his consent to search the bin or its contents, nor was he informed that he could withhold his consent.

At the conclusion of the hearing, the district court denied the motion to suppress, finding that Petitioner had consented to the search.

Petitioner proceeded to trial before the Honorable John W. Bissell, U.S.D.J., and a jury, and was found guilty as charged. He was thereafter sentenced

pursuant to the United States Sentencing Guidelines to the custody of the Bureau of Prisons for a term not to exceed one hundred and ninety months to be followed by five years' supervised release.

On appeal to the United States Court of Appeals for the Third Circuit, Petitioner contended that the government had failed to satisfy its burden of establishing that Petitioner consented to the search. The court, applying a "clearly erroneous" standard to the factual predicates underlying the district court's findings, rejected Petitioner's contention (A2).

As a second issue, Petitioner argued that the evidence presented was not legally sufficient to establish his guilt of possession and use of a firearm in relation to the commission of a drug trafficking offense, in violation of 18 U.S.C. §924(c)(1). Specifically, Petitioner

argued that the government failed to establish the requisite nexus between the drug trafficking offense charged and the semi-automatic pistol found hidden inside the trunk of a Porsche separated from, albeit in close proximity to, a quantity of heroin (A2-3).

The court rejected this argument, too, concluding that the evidence "was more than sufficient for the jury to find that [Petitioner] used [the weapon] in relation to drug trafficking" (A3).

The question presented is therefore appropriate for review by this Court (see United States v Williams, 112 S.Ct. 1735, 1738-41 [1992]).

REASONS FOR GRANTING THE WRIT

A CONFLICT EXISTS BETWEEN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND OTHER CIRCUITS, INCLUDING THE THIRD CIRCUIT, CONCERNING THE SCOPE OF THE PHRASE IN 18 U.S.C. §924(c)(1) "DURING AND IN RELATION TO" IN CASES WHERE THE GOVERNMENT DOES NOT RELY ON THE "FORTRESS" OR "ARSENAL" THEORY FOR CRIMINAL LIABILITY UNDER THAT SECTION.

18 U.S.C. §924(c)(1) in relevant part provides,

> "Whoever, during and in relation to any drug trafficking crime *** for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime *** be sentenced to imprisonment for five years."

In Smith v United States, 113 S.Ct. 2050, 2053 (1993), this Court said that,

> "Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime [,] uses or carries a firearm.' By its terms, the statute requires the prosecution to make two showings. First, the prosecution must demonstrate that the defendant 'use[d] or carrie[d] a firearm.' Second, it must prove that the use or carrying was 'during and in relation to' a 'crime of

violence or drug trafficking crime'" (brackets in original).

Concluding that "using a firearm in a guns-for-drugs trade may constitute 'us[ing] a firearm' within the meaning of §924(c)(1)" (113 S.Ct., at p 2058), the Court explained that,

> "[t]he phrase, 'in relation to' is expansive *** as the courts of appeals construing §924(c)(1) have recognized ***. Nonetheless, the phrase does illuminate §924(c)(1)'s boundaries. According to Webster's, 'in relation to' means 'with reference to' or 'as regards'. The phrase 'in relation to' thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. As one court has observed, the 'in relation to' language 'allay[s] explicitly the concern that a person could be' punished under §924(c)(1) for committing a drug trafficking offense 'while in possession of a firearm' even though the firearm's presence is coincidental or entirely 'unrelated' to the crime ***. Instead, the gun at least must 'facilitat[e], or ha[ve] the potential of facilitating,' the

drug trafficking offense"" (113 S.Ct., at pp 2058-9).

Before Smith, the courts of appeals developed two theories to evaluate the sufficiency of evidence in §924(c)(1) cases. First, where weapons and controlled substances are found in a house, apartment, or some other location playing a central role in the drug operation (see United States v Dahlman, 13 F.3d 1391, 1401 [10th Cir. 1993; United States v Harris, 10 F.3d 596, 597 [8th Cir. 1993] [per curiam]), the courts have developed the "fortress theory" which in essence provides that "'the sheer volume of weapons and drugs makes reasonable the inference that the weapons involved were carried in relation to the predicate offense since they increase the likelihood the drug offense will succeed'" (United States v Pace, 10 F.3d 1106, 1117 [5th Cir. 1993], quoting United States v Wilson 884 F.2d 174, 177 [5th Cir. 1989]).

In United States v Clemis, 11 F.3d 597, 601-2 (1993), the Sixth Circuit stated it this way:

> "the 'during and in relation to' language contained in §924(c)(1) is designed to prevent conviction for mere possession of a firearm during the course of criminal conduct ***. The offense requires proof of some relationship between the weapon and the underlying offense that shows that the weapon at least 'facilitated' the offense. ***. This court has held that when considering the evidence submitted, the term 'uses' and 'carries' in section 924(c)(1) 'should be construed broadly enough to cover the gamut of situations where drug traffickers have ready access to weapons with which they secure or enforce their transactions. Thus, 'carries' does not require actual possession, and 'uses' does not necessitate the display or brandishment of the weapon.
>
> ***
>
> In keeping with the broad construction given the terms of the statute, this Court has joined many other circuits in adopting the 'fortress' theory to be applied to cases involving firearms on premises under the control of a drug offender. ***. Under the 'fortress theory', if 'it reasonably appears that the firearms found on premises

controlled or owned by a defendant and in his actual or constructive possession are to be used to protect the drugs or otherwise facilitate a drug transaction, then such firearms are used 'during and in relation to' a 'drug trafficking crime.' *** The fortress theory has broadened the meaning of the phrase 'during and in relation to.' This Court has recognized that weapons may be kept at the ready to protect a drug house, thereby safeguarding and facilitating illegal transactions."

As a corollary to the drug fortress theory, the Third Circuit, in United States v Theodoropoulos, 886 F.2d 587, 596-7 (1989), said that,

"the presence in plain view of a loaded firearm, even in premises that are not heavily fortified with elaborate security devices, is evidence that the conspirators may have felt some need for security from which a jury could infer that the weapon was an integral part of the conspiracy and was 'used' therein. We thus agree with the Court of Appeals for the Second Circuit that possession of a firearm constitutes use under 924(c) if there is:

i) Proof of a transaction in which the circumstances

> surrounding the presence of a firearm suggest that the possessor of the firearm intended to have it available for possible use during the transaction; or ii) The circumstances surrounding the presence of a firearm in a place where drug transactions take place suggest that it was strategically located so as to be quickly and easily available for use during such transaction.
>
> ***
>
> In this case, the presence of a loaded shotgun in plain sight in Trelopoulos' apartment where it was readily accessible to the occupants was evidence that the firearm was in use during and in relation to the drug trafficking conspiracy proven in this case. The jury could reasonably have concluded that Trelopoulos used at least the shotgun found in the apartment 'as a means of ... protecting his possession of cocaine' [citation omitted]."

A second theory focuses on the circumstances under which the drugs and weapon[s] are possessed, actually or constructively. Under this theory, as one court has held, "the government [must] show

more than mere strategic proximity" (United States v Pace, supra, 10 F.3d at p 1117).

Under the second category, there is apparent disagreement between the Circuit Court of Appeals for the District of Columbia and the other circuits, including the Third Circuit, concerning the breadth of §924(c)(1) in cases where the fortress theory is not applicable.

As examples, in United States v Bruce, 939 F.2d 1053, 1056 (D.C. Cir. 1991), the court reversed the defendant's §924(c)(1) conviction because of legal insufficiency, notwithstanding its affirmance of his conviction of possession with intent to distribute. The court distinguished its prior decisions involving the carrying of weapons while transporting drugs and the "fortress" or "arsenal" theory, explaining that,

> "[h]ere, in contrast, all the government offered by way of evidence was that a small four

shot derringer and ammunition were stored in a paper bag near a cache of drugs. We do not think that this evidence is sufficient to show that the defendant 'used' the gun within the meaning of §924(c). At best, the evidence only supports the inference that the defendant intended to use the gun to facilitate his distribution at some later time and place. When the predicate drug trafficking offense is possession with intent to distribute, the government fails to carry its burden of demonstrating 'use' within the meaning of 924(c) if the evidence shows no more than that the defendant possessed a gun which, it may be inferred, he intended to use in some future distribution of narcotics. Instead the evidence must support the inference that the gun was used to protect the defendant's unlawful possession of drugs that he intended to distribute in the future. To hold otherwise would be virtually to make possession a synonym for 'use'."

In United States v Williams, 952 F.2d 418, 421 (D.C. Cir. 1991), the court clarified its holding in Bruce, stating that,

"[t]here we held that a pistol and some ammunition found near a cache of drugs does not support a

> conviction for use of a firearm in aid of drug trafficking. We expressly distinguished, however, the single gun (and ammunition) there from the arsenal we found in [United States v Anderson, 881 F.2d 1128 (D.C. Cir. 1989). The weapons cache found in [Williams] makes Anderson, not Bruce, the controlling precedent in this case."

Later, in United States v Derr, 990 F.2d 1130 (D.C. Cir. 1993), the court affirmed the defendant's conviction of possession of cocaine with intent to distribute, but reversed his conviction of using a firearm in relation to that possession. Finding the evidence legally insufficient to establish that the gun (a .357 magnum) was used to facilitate the predicate offense in some way, the court said that,

> "[a]lthough an individual may 'use' a gun without even firing or brandishing it ***, there must be evidence showing that the firearm actually facilitated the possession of drugs. Usually this is done by showing that the gun was employed to guard the stash. It is not enough,

> however, that the gun was intended to be used to protect the possession at some later time; it must be performing that function 'during the time of the possession which is the basis of the charge ***. When the predicate offense is possession, it is also insufficient for the evidence to indicate that the gun would be used at a later time in distributing the drugs (990 F.2d, at p 1337).

However, in United States v Bailey, 995 F.2d 1113 (D.C. Cir. 1993), the same court affirmed the defendant's convictions for possession with intent to distribute cocaine and using or carrying a firearm in connection with that drug trafficking offense, rejecting the argument that the evidence was legally insufficient to establish that the defendant "used" a weapon within the meaning of 18 U.S.C. §924(c)(1).

To establish the defendant's "use" of the weapon, the government presented evidence that the defendant was stopped in his automobile on a public highway by two

police officers who, upon searching the passenger compartment found one round of ammunition and twenty-seven plastic bags containing a total of thirty grams of cocaine. A search of the trunk was thereafter conducted by one of the officers who discovered a pistol and a quantity of United States currency. Finding the defendant's reliance Bruce and Derr to be misplaced (995 F.2d, at p 1119), the court explained that,

> "[h]ere in contrast, the cocaine packaged for sale and the $3216 in small bills in the trunk logically support the inference that [the defendant] had already been dealing drugs from his car. And the loaded gun in the trunk was sufficiently accessible to have been used to protect a prior distribution effected outside the confines of the passenger compartment of the car.
>
> In protecting such an earlier distribution of drugs, the gun was necessarily used also to protect [the defendant's] earlier possession of cocaine. As he walked from his car to the point of the sale, like any drug dealer he was constantly in danger of being attacked by

> bandits or by a potential customer. Until the actual sale, of course, he possessed the narcotics. In effect, for a drug dealer on the streets possession and distribution are inextricably linked *** and the jury could reasonably conclude that during the tense moments leading up to the exchange of drugs and money, [the defendant] used the gun in the trunk to protect his inventory of drugs (including the 27 bags recovered by the police)" (995 F.2d, at p 1118).

The Bailey majority suggested that Smith v United States, supra, 113 S.Ct. 2050, may have diluted "the precedential value of Derr and Bruce" (995 F.2d, at p 1119); however, Judge Ginsburg wrote in dissent that "until the Supreme Court or this court sitting en banc changes the law, [Derr and Bruce] are the law and we must apply them faithfully. Because I do not believe that our disposition of the §924(c) issue can honestly be reconciled with Derr and Bruce, I respectfully dissent" (995 F.2d, at p 1119). Notably, in Smith, supra, the majority adopted the D.C.

Circuit's broadened interpretation of "use", pursuant to 18 U.S.C. §924(c), to include situations in which the firearm was used as a medium of exchange or barter (113 S.Ct., at p 2053).

The other circuits have been more expansive, than was the Circuit Court for the District of Columbia (particularly in Derr and Bruce), in construing §924(c)(1) in cases not involving the "fortress" or "arsenal" theory.

As examples, in United States v Reyes-Mercado, 22 F.3d 363 (1994), the First Circuit affirmed the defendant's convictions for conspiring to import cocaine, aiding and abetting in possession with intent to distribute cocaine, aiding and abetting in the use of a communication facility for causing or facilitating the possession with intent to distribute, carrying a firearm in relation to the commission of a drug trafficking crime, and

possession of a firearm having been transported in interstate commerce and whose manufacturer's serial number had been obliterated. Rejecting the claim that the government's evidence was legally insufficient to establish a nexus between the gun found in the glove compartment of the defendant's Pathfinder and the crimes charged, the court explained that,

> "[u]nder §924(c)(1), the government must show that the defendant used one or more firearms during and in relation to a drug trafficking offense [citation omitted]. Use, as described in §924(c)(1), calls for something more than 'possession.' [Citation omitted]. While a weapon need not be brandished, displayed or discharged in order to sustain a conviction under §924(c)(1), there must be some facilitative nexus between the weapon and the criminal activity. (Citations omitted). '[A] conviction will be sustained *** if the possessor of a weapon intended to have it available for possible use during or immediately following the transaction, or if it facilitated the transaction by lending courage to the possessor.' (Citation omitted).

'[U]ltimately, whether or not the gun[] helped [a defendant] commit the drug crime is a matter for the jury, applying common-sense theories of human nature and causation." (Citations omitted).

When viewed in the light most favorable to the government, the evidence shows that a reasonable jury could find beyond a reasonable doubt that defendant used the gun in connection with a drug crime as required by §924(c). First, the Pathfinder belonged to and was registered to defendant. Second, throughout the consummation of the drug deal, which took place inside the Pathfinder, the loaded gun was located in the glove compartment directly in front of the passenger seat where defendant was seated. Finally, the jury heard ample testimony from Agent Ruiz regarding the details of defendant's involvement in the cocaine transaction. This testimony described the plan devised in Colombia to deliver the cocaine to defendant in Ponce, Puerto Rico. Based on this evidence, the jury could conclude that the gun was present by design, rather than happenstance, and that it was used by defendant in connection with the drug purchase ***" (22 F.3d, at p 367; see also, United States v Paulino, 13 F.3d 20, 26 [1st Cir. 1994].

In United States v Hughes, 15 F.3d 798 (1994), the Eighth Circuit affirmed the defendant's convictions for possession with intent to distribute, and using a firearm during and in relation to a drug trafficking offense. The court rejected the defendant's contention that the government's evidence was legally insufficient to establish a nexus between a revolver seized from the trunk of his car and the crimes charged, explaining that,

> "[t]his court has held that the fact that the gun may not have been immediately available is not dispositive of the issue of whether the gun was used during and in relation to a drug offense. Citation omitted. The government need not prove that the defendant brandished, discharged or carried the weapon at the time of the offense for the jury to find defendant used the firearm during and in relation to a drug trafficking crime. Rather, 'use' may be inferred from the firearms availability and presence. [Citation omitted]. Moreover, the Supreme Court has recently stated that the term 'in relation

> to' *** was intended to have an 'expansive' meaning ***.
>
> Here, the jury could reasonably infer that the weapon located in the trunk was used to facilitate the appellant's possession and alleged intended sale of the narcotics. The gun was located next to a large quantity of drugs and was readily available to protect appellant's drug supply. Under these circumstances, the possession of the gun had the potential of facilitating the drug transaction by serving to protect the drugs. We conclude that the government produced sufficient evidence to support the jury's verdict" (15 F.3d, at p 803; see also United States v Harris, 10 F.3d 596, 597 [8th Cir. 1993]).

In the case at bar, the government presented evidence that, while searching the storage bin and the Porsche found therein, federal agents found in the vehicle's front-end trunk a quantity of drugs and a semi-automatic pistol. Specifically, to find the contraband, the agents lifted "the carpet, the cardboard carpet" which covered "where the spare tire was kept" (A184), and found "two bags of

heroin along with what we call cut *** In with that heroin, with the cut was this [pistol]. It was sitting right on top of the rest of the stuff" (A181-2; 184). The contraband was not "plainly apparent just looking in the trunk" (A184-5). In actuality, the weapon and drugs, though in close proximity, were separated in that the pistol was discovered in "an area underneath the carpet for the jack" (A186-7).

No evidence was presented that the weapon belonged to Petitioner, or that he ever possessed or even handled it. Moreover, no evidence was presented that the Porsche was owned by Petitioner or that he was in possession of it for any purpose other than to repair it. Though a certificate of title and temporary insurance card were found in Petitioner's home, both documents identified the

Porsche's owner as someone else, residing at a different location.

Finally, when arrested, Petitioner was alleged to have told a law enforcement officer that he had been "preparing a package of heroin for a customer who was coming in [to New Jersey] from Boston that day." Petitioner did not know the alleged purchaser's name but told the officer that "the [unknown] person was supposed to page [Petitioner] on his beeper when he arrived in the New Jersey area, at which time he would get in touch with that person and deliver the package" of heroin.

Similar to Bruce, supra, 939 F.2d 1053, and Derr, supra, 990 F.2d 1330, given the location of the single weapon, its limited accessibility, i.e., underneath the "cardboard carpet" in the Porsche's trunk which was slightly ajar, and the statement attributed to Petitioner concerning a distribution that was to take place later

that day, the inference to be drawn was that Petitioner "intended to use the gun to facilitate his distribution", rather than using it "to protect [his] [alleged] unlawful possession of drugs that he intended to distribute in the future. To hold otherwise would be virtually to make possession a synonym for 'use'" (United States v Bruce, supra, 939 F.2d, at p 1056).

In affirming Petitioner's conviction for violating §924(c)(1), the Third Circuit apparently rejected the approach taken by the Circuit Court for the District of Columbia in Bruce and Derr and, consistent with its earlier ruling in United States v Theodoropoulos, supra, 866 F.2d 587 (1989), opted for the broader approach evidenced by

the First and Eighth Circuit cases discussed ante, pp 24-8.[1]

Certiorari should be granted to resolve the conflict in the approaches taken by the Court of Appeals for the District of Columbia (which was recently questioned by that court in United States v Bailey, supra 995 F.2d 1113), and by other circuits, including the First and Eighth circuits, concerning the applicability of §924(c)(1) to cases other than those relying on the so-called "fortress" or "arsenal" theory of liability.

---

[1] Petitioner referred at length in his reply brief to the Third Circuit to the approach taken by the District of Columbia and, specifically, to Bruce and Derr.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
September 12, 1994

Respectfully submitted,

RICHARD E. MISCHEL, P.C.
Attorney for Petitioner
233 Broadway, Suite 3507
New York, New York 10279
(212) 227-7040

RICHARD E. MISCHEL, ESQ.
Of Counsel

APPENDIX

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 93-5359

UNITED STATES of AMERICA

v.

JORGE L. HERNANDEZ,

Appellant

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Criminal No. 92-00298-1)
District Judge: Hon. John W. Bissell

Submitted Under Third Circuit LAR 34.1(a)
June 1, 1994

Before: SCIRICA and NYGAARD, *Circuit Judges*
and ALDISERT, *Senior Judge*

(Opinion Filed: JUN - 8 1994)

MEMORANDUM OPINION

NYGAARD, *Circuit Judge*

Appellant Jorge Hernandez was arrested following a search of his storage bin and automobile, which disclosed several bags of heroin, drug paraphernalia, and a firearm. A jury found him guilty of possessing with intent to distribute a Schedule I controlled substance (heroin), 21 U.S.C. § 841(a)(1) (Count I); using or carrying a firearm during and in relation to the commission of a drug trafficking offense, 18 U.S.C. § 924(c) (Count II); and possessing a firearm with an obliterated manufacturer's serial number, 18 U.S.C. § 922(K) (Count III). He was sentenced under the Sentencing Guidelines to prison for 130 months on Count I and 60 months on Counts II and III, for a total of 190 months followed by five years of supervised release. He was also ordered to pay a $100,000 fine and a $150 special assessment. Hernandez contends on appeal that he did not consent to the search and that the evidence presented at trial was insufficient to convict him of using or carrying a firearm during and in relation to the narcotics offense. We will affirm.

Before trial, appellant moved to suppress evidence seized as a result of the search. He argued that the agents never sought his consent to the search, and in the alternative, that even if they did seek his consent, he did not voluntarily give it. The district court denied Hernandez' motion, finding that the consent was in fact sought from him and that he, without being coerced, gave it. The district court made other specific findings with respect to all elements of both the request and the consent issues. (*See* App. at 160-74.) We are not convinced that any of the court's findings were clearly erroneous and conclude that appellant's first contention is without merit. *See United States v. Kikumura*, 918 F.2d 1092, 1093 (3d Cir. 1990).

Appellant's second contention on appeal is that the evidence connecting him to the machine gun found in the Porsche is so deficient that no rational trier of fact could have found that he used or carried the firearm in connection with drug trafficking. Viewing the evidence in the light most favorable to the

government, we conclude that there was sufficient evidence from which the jury could find the defendant guilty of this count.

The evidence need not show that Hernandez *actually* possessed the firearm to establish violation of 18 U.S.C. § 924(c), constructive possession is sufficient. *See United States v. Jefferson*, 974 F.2d 201, 205 (D.C. Cir. 1992). Here, the government established that the defendant constructively possessed the weapon by showing that he rented the storage bin and owned the Porsche in which the gun was found. The government showed that the gun was "used" for purposes of § 924(c) by showing a sufficient nexus between the alleged purpose of the gun and the predicate offense. *See United States v. Theodoropoulos*, 866 F.2d 587, 596 (3rd Cir. 1989). The machine gun was stored in proximity to the heroin, in the trunk of defendant's Porsche, and we can infer that it was intended for protection during a drug transaction. Hernandez confessed that he had been preparing 350 grams of heroin for sale.

That the firearm was used "during and in relation to a drug trafficking offense" is likewise beyond question. It was "strategically located so as to be quickly and easily available for use during [a drug] transaction." *Theodoropoulos*, 866 F.2d at 597 (quoting *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988)). The evidence was more than sufficient for the jury to find that the defendant used the machine gun in relation to drug trafficking, and we conclude that Hernandez' second contention is also without merit.

In sum, the conviction and the sentence will be affirmed in all respects.

TO THE CLERK:

Please file the foregoing memorandum opinion.

Circuit Judge